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THE ROYAL TRUST COMPANY and ROBERT W. McMURRAY, Executors of the Estate of William Marr Crawford, deceased (*Plaintiffs*) ..... APPELLANTS;

CATHERINE McLEAN CRAWFORD (*Defendant*) ..... APPELLANT;

AND

CATHERINE GRAHAM CRAWFORD and others (*Defendants*) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Wills—Residuary estate consisting of unauthorized securities—Trust for conversion with power to postpone—Rights of Tenant for life—Enjoyment in specie.

A testator gave the residue of his estate upon trust to convert with power to postpone conversion and directed his trustees to pay the income of his residuary estate to his widow for life and upon her death to set aside sufficient of the residue to yield certain annuities and subject thereto to divide the residue among the testator's nephews and nieces then alive. The major part of the residue consisted of shares in a company, a type of security in which trustees were not by law authorized to invest. At the date of death the company had built up a large surplus which it proceeded to distribute to shareholders as a dividend. This raised the question as to whether the widow was entitled to enjoy the dividends in specie or whether an order similar to that in *In re Chaytor: Chaytor* v. *Horn* [1905] 1 Ch. 233 should be made.

Held (Estey and Cartwright JJ. dissenting): That upon a proper construction of the will it was to be presumed that the testator intended that the residue was to be enjoyed by different persons in succession and applying the rule in *Howe* v. *Dartmouth (Earl)* 7 Ves. 137, a duty rested on the trustees to convert. The rule might have been excluded if the will disclosed an intention either by express direction or necessary implication that the property should be enjoyed in specie but the onus of showing this had not been met.

Per Estey and Cartwright JJ. (dissenting): By clause IV (*b*) of the will a power was conferred upon the trustees to retain until the trusts were completely executed. By clause IV (*e*) the testator gave to his widow the net annual income of all the securities representing the residue of his estate including income from unconverted property subject only to payment of specified annuities thereby excluding the rule in *Howe* v. *Dartmouth, Earl, supra. Re Thomas* [1891] 3 Ch. 482 at 486 approved in *In Re Chaytor, Chaytor* v. *Horn* [1905] 1 Ch. 233 at 238 referred to.

*PRESENT: Kerwin C.J. and Rand, Kellock, Estey and Cartwright JJ.

Judgment of the Court of Appeal for British Columbia (1953-54) 10 W.W.R. (N.S.) 433 affirmed.

APPEAL from the judgment of the Court of Appeal for British Columbia (1) affirming a judgment of Macfarlane J. (2) determining certain questions raised on originating summons by the executors of the Estate of William Marr Crawford, deceased.

C. K. Guild, Q.C. and *C. C. Locke* for the appellant C. M. Crawford.

P. R. Brissenden for the appellant executors.

R. H. Tupper, Q.C. and *D. K. Macrae* for the remaindermen, respondents.

THE CHIEF JUSTICE:—There can be no dispute as to the rule in *Howe* v. *Lord Dartmouth* (3), the statement of which in the 4th edition of Hanbury's Modern Equity was approved in *In re Lennox Estate* (4):—

> Where residuary personalty is settled on death for the benefit of persons who are to enjoy it in succession, the duty of the trustees is to convert all such parts of it as are of a wasting or future or reversionary nature, or consist of unauthorized securities, into property of a permanent and income-bearing character.

It was pointed out by this Court that the rule does not proceed on any presumed intention of the testator that the property should be converted, but is based upon the presumption that he intended it to be enjoyed by different persons in succession.

The *Lennox* judgment also recognized that the rule might be excluded if a will disclosed an intention either by an express direction or necessary implication that the property should be enjoyed in specie, and held that the onus of showing that the words in any particular will exclude the rule lies on those who submit it should not be applied. *Macdonald* v. *Irwine* (5), had endeavoured to put an end to refinements of construction, but some of the later decisions of single Judges in England, referred to in the Courts below and in argument before us, if correct, would go very far towards effecting the extinction of a salutary

(1) (1953-54) 10 W.W.R. (N.S.) 433; [1954] 1 D.L.R. 362.
(2) (1953) 8 W.W.R. (N.S.) 519, [1953] 4 D.L.R. 851.
(3) (1802) 7 Ves. 137; 32 E.R. 56.
(4) [1949] S.C.R. 446.
(5) (1878) 8 Ch. D. 101.

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Kerwin C.J.

rule. However, the problem is always one of construction and, in the present case, I agee with the conclusions of the Judge of first instance and of the Court of Appeal that the rule has not been excluded.

The appeal should be dismissed and the costs of all parties paid out of the estate, those of the executors as between solicitor and client.

RAND J.:—This appeal arises out of the administration of the estate of a testator who died in 1942 and the question is whether a dividend of $450,555.71 less taxes of $124,206.18, representing accumulated earnings at the end of 1939 of a stevedoring company, 1934 of the 2334 issued shares of the capital stock of which were owned or controlled by the testator and now by the trustees, goes as income to the life tenant widow or is to be treated as capital. The estate was valued at $680,818.73, with $529,746.76 representing the interest in the company. The latter is largely a servicing organization, the physical assets of which are relatively of small value. The testator had been the directing force within the company and its good will and position in the shipping life of Vancouver were largely his creation.

The dividend was at the rate of $193.04 on each share against a valuation of $256.70 for succession duty purposes and as is seen the abstraction of these earnings in 1947 reduced that value by approximately 75%. The company had before and has since the death paid ordinary dividends and since 1939 has added further accumulations to the reserves.

The original executors and trustees were the appellants Trust Company and McMurray and the widow; but the latter retired in 1950, and appeals as a beneficiary.

By the will, after a legacy of $10,000 and of furniture, household effects and other personal articles to his wife, the testator gives all the residue of his property to the trustees upon trust, first, to allow his wife to keep and use the home until her death and then

> to sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner and upon such terms and either for cash or credit or for part cash and part credit as my trustees may in their discretion decide upon, with power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best, and I hereby declare that my trustees may retain any portion of my estate in the

form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my trustees in their discretion deem advisable; and my trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

After paying his debts, expenses, duties and taxes, the trustees are directed

to keep the residue of my estate invested and to pay the net annual income thereof until the death of my wife as follows:—

> In the event of the same not exceeding the sum of Six Thousand Dollars ($6,000), the whole net annual income shall be paid to my wife by quarterly instalments.

Out of the excess beyond that sum annuities were to be paid to certain relatives, and

any surplus income over and above what is required to pay the aforesaid annuities shall be paid to my wife.

Upon the death of his wife, the trusts run to nephews and nieces and their issue, in life and remainder, as hereafter set forth.

The trustees are authorized from time to time to make advances to the widow out of prospective income or

to pay to or for her benefit such part of the capital of my estate as my trustees in their uncontrolled discretion may deem necessary or advisable for her proper support, maintenance and comfort and to advance to and for the benefit of any of my nephews or nieces or their issue such part or parts of the capital of the prospective shares of nephews or nieces or their issue or of the share of my estate for the time being held for the benefit of such nephews or nieces as in their uncontrolled discretion my trustees may deem advisable.

He directs that should any company in which he or his estate holds shares or other interest increase its capital, the trustees may take up and out of the estate moneys pay for the proportions of the increased capital to which the estate may be entitled or may sell the rights thereto. In the interest of the estate, they may purchase additional shares in any such company and join in any plan for its reconstruction, reorganization or amalgamation or for the sale of its assets, and accept shares or securities in lieu of or in exchange for the shares or other interest held by the estate. They may also enter into any pooling or other agreement in connection with the shares or interest. He declares that

in giving to my trustees the foregoing powers, it is my intention to give my trustees power and authority to deal with my interest in any such company or corporation in which I may be interested at the time of my death to the same extent and as fully as I could do if I were alive.

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Finally he designates his wife to be the preferred beneficiary of all life and accident insurance policies except those expressly allocated to administration purposes; the proceeds are to be invested upon trust to pay to her the net income and from time to time so much of the principal as she may require to enable her to live and to keep herself in comfortable circumstances. Any balance remaining at the date of her death is to be held for such persons as she may by will appoint, in default of which it is to be divided among her next of kin as in the case of intestacy. The amount of insurance within this clause exceeds $225,000 but most of it is claimed by the company. This provision is of significance in negativing any implication that other capital is to be placed in effect within the appointment of his wife or is otherwise to go to her relatives.

A wide discretionary authority has thus been conferred on the trustees and they are in control of the company. They decide whether the shares in the company should be sold or the accumulation left in the reserve or distributed in the form of new stock or in cash. They could sell during the first or any succeeding life tenancy. On the contention made, there would be three interests to which, depending on how and when it was dealt with, the dividend might go: if in cash, to one of the two sets of life interests; if in stock, as capital in remainder. Continuing the shares as an investment would inevitably work to the advantage of one or other of the beneficiaries as compared with the benefits following an immediate conversion. But subject to that scope of discretion, the duty to convert remains an underlying responsibility.

As between interests of this kind, in the absence of a clear authorization to prefer one interest over another, the duty of a trustee is to act impartially. When property is to be enjoyed successively, the testator normally contemplates its preservation for that purpose. It is the fulfillment of this overriding intention that underlies the rule of apportionment through actual or constructive conversion of wasting or hazardous into permanent investments. This principle has been elaborated in a long line of decisions not altogether reconcilable with each other, but in its main

features exemplified in *Howe* v. *Earl of Dartmouth* (1); *Dimes* v. *Scott* (2); *In re Chaytor* (3) and *Re Parry* (4).

We have in this case the risks to that impartiality not only of the power to postpone conversion, which, identical with that to retain, is not here an independent means to benefit or prejudice a particular interest but an ancillary incident to conversion; but also the fact that the trustees, through control of the company, determine when and in what amounts dividends shall be declared. Unless, then, it is evident that the testator intended to subject the bequests to the fortuitous or designed accidents or contingencies of such an administration, and it is his intention to be gathered from the will and the surrounding circumstances which must prevail, the situation is one for the application of the rule.

Does the will classify existing investments as authorized and throw the entire hazard of discretionary action, instigated by whatever motives, directly on one or more of the interests created? Since capitalizing or distributing the earnings must necessarily be an immediate and foreseen benefit to one interest and, as contended, a corresponding detriment to one or both of the others, are the latter as to their quantum to be treated as a function of that discretion? In substance this would mean that to a high degree the trustees could determine the benefits conferred not through any specific authority, as in appropriating capital, but, in acting as shareholders or directors, in the course of ordinary administration. There is no special authority conferred for these offices, and to permit the trustees so to affect the competing interests would enable them to proceed on what they considered to be the deserts or merits of the different legatees. At least it would be impracticable to challenge any action taken whatever might have been the motive behind it. They could in large measure defeat the ultimate remainders by eviscerating the company, during the life tenancies, of all income including accumulations. Considering the will as a whole this is no more understandable in the case of the widow than in that of the nephews and nieces. The annuity of $6,000 to the former is some indication of

(1) 7 Ves. 137; 32 E.R. 56.
(2) (1828) 4 Russ. 195; 38 E.R. 778.
(3) [1905] 1 Ch. 233.
(4) [1946] 2 All. E.R. 412.

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what the testator had in mind. With these foreseeable possibilities, can it be said that his object included enabling the trustees to work havoc with the elaborate provisions in which he has expressed himself, especially with the widow, holding the largest life interest, acting as one of them?

These possibilities do not appear to have been explored by the testator. One purpose made clear was that his wife should be secured in the enjoyment of that comfort and station to which she had become accustomed, even to the appropriation of capital. But the latter power runs to the benefit of the nephews and nieces and their issue as well; and it is significant that the appropriation in the former case is for "her proper support, maintenance and comfort", and in the others, as the trustees "deem advisable". This general provision emphasizes the assumption of the conservation of the capital which is to be trenched upon only in the exercise of special and specific powers; it implies also the ordinary conception of income as moneys periodically received.

The residue other than the interest in the company and the insurance consisted of land and mining, industrial, transportation, power and miscellaneous stocks approximating $75,000 in value, plus $50,000 in Canadian government bonds. On the death of the widow, the trustees are to set aside sufficient of the residue to yield the life annuities already mentioned and, subject thereto, "to divide the residue . . . into as many equal parts as shall exceed by one the number of nephews and nieces of mine then alive", treating, for that purpose, the deceased parent of issue then living as being still alive, and to pay "the net income respectively derived therefrom" to each nephew or niece for life. This implies that issue in the case of a deceased parent would at once be entitled to a share of the corpus. Upon death the trustees hold the share in trust for the issue in such proportions and on such terms and conditions as the parent beneficiary may by will direct. If the latter leaves a widow or widower surviving the whole or part of the income of the share may be directed to such person until death or remarriage. In default of direction, the share is to be held for the surviving issue, and should there be no issue, it is to be added to the shares of the other nephews and nieces or their issue. In the case of nephews surviving

the testator but predeceasing the widow and leaving issue then living, the trustees are to "set aside" the appropriate shares and to "keep such shares or share invested" for the benefit of the issue until they become of age when they or the survivors become entitled to them. It would be inconsistent with the intent of this language that the unauthorized investments should be so divided. How, in that case, could equality in the shares be maintained? To mix up land with mining and similar stocks in such a division and to retain any part of them in specie would be in conflict with the settlement intended. The case of a share vesting in the issue of a deceased nephew with life interests still existing would further complicate any equal division by changing the destination of a special dividend and thus affecting the value of the capital. The income is related to the share. Equality of shares assumes for the life tenants a real or notional conversion and division. Equality is contemplated under the primary duty of the trust, and it necessitates a corresponding actual or notional division with an equality of income and principal to each beneficiary of the same class. This would be impossible by a division in specie on the death of the widow of the transmitted investments, and if that is so, the powers are equally subject to a notional conversion from the death of the testator. The income of the widow, as to quality, was intended to be the same as to the nephews and nieces.

I am unable, therefore, to agree that the direction to pay the widow the "income" of the residue requires the special dividend to go to her, representing as it does, a value which at the death was largely the substance of the estate. In *Brown* v. *Gellatly* (1), similar language was used, "to pay the income", but Lord Cairns found no difficulty in holding that the "income" from the ships which were to be sold as and when the executors thought proper did not extend to the actual profits of the interim business which they carried on, but only to the interest on a constructive sale value. The circumstances and the distribution here are incompatible with the interpretation that the widow or the other life tenants are to take the income in specie; and applying the principle there laid down, the former is not entitled to

(1) (1867) 2 Ch. App. 751.

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receive this dividend as income; she is entitled to interest on an estimated value of the stock as provided by the judgment appealed from.

The appeal should be dismissed with costs to all parties out of the estate, those of the trustees as between solicitor and client.

KELLOCK J.:—By paragraph IV of the will here in question, the testator devised and bequeathed "all the rest and residue" of his property to trustees upon trust to permit his wife the use of certain real property, and, by sub-paragraph (*b*), to sell, call in and convert into money "all the remainder" of his estate not consisting of money at such time as his trustees might, in their discretion, decide, with power to postpone conversion. He also empowered them to retain any portion of his estate in the form in which it might be at his death, notwithstanding that it might not be in the form of trustee investments, without being responsible for any loss that might happen "to my estate" by reason of so doing. The sub-paragraph reads as follows:

(*b*) To sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit as my Trustees may in their discretion decide upon, with power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best, and I hereby declare that my Trustees may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustees in their discretion deem advisable, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

The testator then provided for payment of debts and succession duties, and the sum of $10,000 to his wife. By sub-paragraph (*e*) he directed the trustees to "keep the residue of my estate invested" and to pay "the net annual income thereof" so that his wife should receive during her life at least $6,000 annually and, in addition, any surplus remaining after payment of certain annuities.

The question in this appeal is as to whether or not the income payable to the widow includes certain substantial dividends received by the trustees from two companies in which the testator held the controlling interest, the

dividends having been declared following upon the amendment of the *Income War Tax Act* in 1945, which enabled the distribution within a limited time of accumulated profits on terms more favourable to shareholders than formerly had been the case. The testator's estate consisted largely of company shares and particularly of the shares in these companies which were not investments in which, by law, trustees are authorized to invest.

The applicable rule is thus expressed by Baggallay, L.J., in *Macdonald* v. *Irvine* (1), as follows:

> . . . the rule as laid down by Lord Eldon in *Howe* v. *Earl of Dartmouth* (2), and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering* v. *Pickering* (3), amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous.
>
> But it must be borne in mind that the rule when acted upon is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it.

The sole question between the parties is as to the application of this rule in the present instance.

It is settled upon the authorities that where there is a direction to convert with power to postpone and to retain existing investments, it is not necessarily to be implied that the life tenant is to be paid the actual income pending conversion. The real point in such cases is as to whether the power to retain is to be construed as a power to retain permanently, or only until the trustees can sell advantageously; or, in other words, whether the power to postpone and the power to retain are merely ancillary or subsidiary to the trust for conversion. If the latter, it is necessary to find some other indication in the will to that effect before it is possible to say that the life tenant is entitled to the income in specie.

(1) 8 Ch. D. 101 at 112. (2) 7 Ves. 137.
(3) 4 My. & Cr. 289.

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The extreme narrowness of the point is well illustrated by contrasting the will in question in *Inman's* case (1), with that under consideration in *In re Thomas* (2). In the former, Neville J., considered that the clause authorizing retention was an independent power rather than one ancillary or subsidiary to the trust for conversion, whereas in *Thomas's* case, Keckewich J., considered it necessary to seek for the intention of the testator beyond the provisions of the will directing conversion at the discretion of the trustees with power to retain for such period or periods as they should think fit "without being answerable for any loss which might be occasioned thereby."

In the case at bar, I am of the opinion that the power to retain is not a power to retain permanently but merely until the trustees can sell advantageously. This power is, in my opinion, directed only toward protecting the trustees against "any loss that may happen to my estate" by reason of its exercise in any particular case.

In my view this construction is strengthened by paragraph VII of the will, which authorizes the trustees, should any company in which the testator might hold shares, increase its capital, to subscribe for and take up the estate's proportion of the increased capital, or to sell the rights. Also, if the trustees should think it in the interest "of my estate" to do so, they are authorized to purchase additional shares in any such company. They are also authorized to join in any plan of reconstruction, reorganization or amalgamation of any such company or in the sale of the assets thereof and, in pursuance of any such plan, to accept any securities in exchange for existing securities. The trustees are also authorized to enter into any pooling agreement in connection with any such company. The testator provided that in giving his trustees these powers, it was his intention to give them power and authority to deal with his interest "in any such company or corporation" to the same extent and as fully as he could had he been alive.

It is to be observed that the powers given by paragraph VII are limited to companies in which the testator held securities at the date of his death or, in which securities might be subsequently acquired by his estate. In the latter case such securities would of necessity be trustee securities. All the powers given by this paragraph are expressly given

(1) [1915] 1 Ch. 187. (2) [1891] 3 Ch. 482.

"in the interest of my estate" and do not, in my view, afford any argument that the power to retain contained in sub-paragraph (*b*) of paragraph IV is a power to retain permanently. That power is therefore not to be construed as having been given for the benefit of the tenant for life. This was the view of both courts below.

It is, however, contended that even though the will is to be construed as above, the direction in sub-paragraph (*e*) of paragraph IV to keep "the residue of my estate" invested and to pay the "net annual income" thereof in the manner indicated, is a sufficient expression on the part of the testator of an intention that his widow shall have the actual income of investments pending conversion. For the consideration of this argument I turn to later provisions of the will.

By paragraph IV(*f*) the testator directs his trustees, upon the death of his widow, to "set aside" sufficient of the residue of his estate to yield certain annuities and, subject thereto, to "divide the residue" into as many *equal* parts as shall exceed by one the number of nephews and nieces of his then living. (The significance of the extra share is irrelevant for present purposes). Nephews or nieces who should be then dead having left issue are to be considered as living. The trustees are then directed to pay the net income derived from the respective shares to the nephews and nieces for life and upon death to hold the share of capital in trust for their issue on such terms as they may have directed by will, and in default of such direction, in trust for such issue. Under these provisions issue of a deceased nephew or niece would be entitled, immediately on the death of the widow, to capital.

I agree with my brother Rand, whose judgment I have had the benefit of reading, that these provisions do not contemplate the division *in specie* of unauthorized investments. The stipulated equality of shares can be effected only by an actual, or pending an actual, by a notional conversion.

This becomes even more clear when one considers paragraph VIII of the will, which contemplates that lands or leaseholds may form part of the estate of the testator at his death. When the time for division arrives, it might well be impracticable, even though otherwise unobjectionable, to

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make the division called for, owing to the existence in the estate of assets of a varied character. Even assuming for the moment that the power to postpone conversion could still be said to be applicable, there would clearly have to be a notional conversion if an actual one should be either not feasible or improvident. If that be so, there is nothing in these provisions to indicate that in paragraph IV(*e*) the testator has intended that the "income" there directed to be paid to the widow is to be actual income.

I do not think it necessary to deal particularly with any of the authorities cited. The principles are well settled, it being a question in each case as to whether or not the testator has indicated a sufficient intention that actual income shall be paid to the persons entitled to life interests pending the conversion he has directed. In the case at bar, I can find no sufficient intention and would dismiss the appeal. The costs of all parties should be taxed and be paid out of the estate, those of the trustees as between solicitor and client.

The judgment of Estey and Cartwright JJ. (dissenting) was delivered by:—

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia affirming a judgment of Macfarlane J. determining certain questions raised on originating summons by the executors of the late William Marr Crawford, hereinafter referred to as the testator.

The question involved is whether upon the true construction of the will of the testator there is sufficient evidence of his intention that his widow should enjoy the income of his unconverted residuary personal estate in specie to exclude the operation of the rules of equitable apportionment which are commonly referred to collectively as the rule in *Howe* v. *Lord Dartmouth* (1), and of which that case and the case of *Dimes* v. *Scott* (2), furnish familiar illustrations.

The testator died on May 20, 1942, leaving a will dated June 24, 1937, and two codicils dated January 10, 1938, and January 14, 1938. In the affidavit filed on behalf of the executors under the provisions of The Succession Duty Act the estate of the testator was valued at $680,818.73. This

(1) 7 Ves. 137. (2) 4 Russ. 195.

total was made up in part of 1,054 shares of the capital stock of Empire Stevedoring Company Limited, hereinafter referred to as Empire, valued at $270,561.80 and 2,450 preferred shares and 50 common shares of the capital stock of Marr Estates Limited valued at $259,184.96. The last-mentioned company is a private company which the testator caused to be incorporated in 1927 to act generally as an investing and holding company and its only shareholders are the executors of the testator and their nominees. At the date of the testator's death and at the date of the application to Macfarlane J. this company held 880 shares of Empire. The authorized capital of Empire consists of 2,500 shares, 1,934 of which the executors control either directly or through Marr Estates Limited. The testator also owned at the time of his death shares in twenty-two other companies which were valued at a total of about $66,000. None of the shares above referred to are securities in which trustees are authorized to invest trust-money under the laws of British Columbia.

We were informed by counsel that at the date of the hearing of this appeal the executors still retain the shares of Empire and of Marr Estates Limited which the testator owned at the date of his death, that Empire has continued in business, has operated profitably through the years, has paid dividends over the years since the testator's death and has, in addition, accumulated a considerable sum of undistributed profits.

Towards the end of the year 1947, pursuant to Part XVIII of the *Income War Tax Act* as enacted by Statutes of Canada, 1945, 9-10 Geo. VI, c. 23, Empire distributed accumulated undistributed income by way of dividend of which the executors received $177,855.49 directly from Empire and $148,494.04 through Marr Estates Limited.

The questions raised before Macfarlane J. were whether these sums are capital or income in the hands of the executors and (by an amendment of the originating summons to which all parties consented) whether if such sums are income it is income to which the testator's widow is entitled and if not entitled in whole then to what extent if any. Macfarlane J. held (i) that the sums in question constituted income, and (ii) that the widow was not entitled to such income in specie but that it was to be dealt with under the

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rules of equitable apportionment referred to above. The first ruling of the learned judge is not questioned by any party but the widow and the executors appeal against the second and ask that it be declared that the widow is entitled to the whole of the sums in question. We were informed by counsel that if it should be held that the learned judge was right in holding that the rule in *Howe* v. *Lord Dartmouth* applies no question is raised as to the manner in which he has directed the apportionment of these sums between the life-tenant and the remaindermen.

The will so far as relevant may be summarized as follows:—

Paragraph I revokes former wills.

Paragraph II appoints executors.

Paragraph III bequeaths certain personal articles to the widow.

Paragraph IV opens with the words:—

I give, devise and bequeath all the rest and residue of my property of every nature and kind and wheresoever situate, including any property over which I may have any power of appointment, to my Trustees upon the following trusts, viz.,

And continues:—

(*a*) to provide a residence for the widow during her life.

(*b*) To sell, call in and convert into money all the remainder of my estate not consisting of money at such time or times, in such manner and upon such terms, and either for cash or credit or for part cash and part credit as my Trustees may in their discretion decide upon, with power and discretion to postpone such conversion of such estate or any part or parts thereof for such length of time as they may think best, and I hereby declare that my Trustees may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustees in their discretion deem advisable, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

(*c*) to pay all debts and succession duties.

(*d*) To pay to my said wife as soon as possible after my death, the sum of Ten Thousand Dollars ($10,000.00);

(*e*) To keep the residue of my estate invested and to pay the net annual income thereof until the death of my wife as follows:—in the event of the same not exceeding the sum of Six Thousand Dollars ($6,000.00) the whole net annual income shall be paid to my wife by quarterly instalments but in the event of any excess over the sum of Six Thousand Dollars ($6,000.00) such excess up to the equivalent of Three

Hundred Pounds (£300) sterling shall be divided equally between my three sisters Catherine Graham Crawford and Helen Marr Morton, both of Glen Villa, Charleston, Fifeshire, Scotland, and Agnes Mary Henderson of the United Free Church Manse, Beith, Ayrshire, Scotland, and payable to them semi-annually. If any of my said three sisters should predecease me, or surviving me should predecease my wife, I DIRECT that the excess of income herein directed to be paid shall be reduced so that the maximum annual income received by the survivors of my said three sisters shall be a sum equivalent to One Hundred Pounds (£100) Sterling each. In the event of such net income exceeding the said sum of Six Thousand Dollars ($6,000.00) payable to my wife and the annuities not exceeding Three Hundred Pounds (£300) Sterling payable to my said sisters, I DIRECT that the sum of Two Hundred Dollars ($200.00) per month be paid to EMILY HUNTER SMITH of the said City of Vancouver, presently employed with me as my Secretary in the Empire Stevedoring Company Limited, until her death. Any surplus income over and above what is required to pay the aforesaid annuities shall be paid to my wife.

(*f*) Upon the death of my said wife to set aside sufficient of the residue of my said estate as will yield an annuity to each of my said three sisters as shall then be alive of one hundred pounds (£100) Sterling during their respective lifetime and an annuity to the said Emily Hunter Smith of Two Thousand Four Hundred Dollars ($2,400.00) during her lifetime. Subject to the said annuities, to divide the residue of my estate into as many parts as shall exceed by one the number of nephews and nieces of mine then alive and I DIRECT that if any nephew or niece of mine shall then be dead who shall have left issue him or her surviving and then alive, such deceased nephew or niece of mine shall be considered as alive for the purpose of such division.

(*g*) My trustees shall set aside two of such equal shares for my nephew WILLIAM MARR CRAWFORD, son of my brother Alexander Ogston Crawford of the said City of Vancouver, and one of such equal shares for each of my other nephews and nieces.

My Trustees shall pay the net income respectively derived therefrom to and for each such nephew or niece during his or her lifetime and upon his or her death shall be held by my Trustees in trust for the issue of such deceased nephew or niece, or some one or more of them in such proportions and subject to such terms and conditions as he or she may by his or her last Will direct, provided that if such nephew or niece should leave a widow or widower him or her surviving, he or she may by his or her last will direct the whole or any part of the income of such share to be paid to his widow or her widower until the death or remarriage of such widow or widower, whichever first occurs. In default of direction by such nephew or niece, or insofar as the same shall not extend or take effect, such share shall be held by my Trustees in trust for the issue of such nephew or such niece as survive him or her in equal shares per stirpes. If such nephew or niece should leave no issue him or her surviving, then such share, subject to any provisions which may be made by such nephew for his widow or such niece for her widower in accordance with the terms of this paragraph, shall be added to the shares in this my Will directed to be held for my other nephews or nieces or their issue, as the case may be.

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My Trustees shall set aside two of such equal shares for the issue of my said nephew William Marr Crawford if he shall have survived me but predeceased my said wife leaving issue him surviving and then alive, and one of such equal shares for the issue of any other nephew or niece of mine who shall have survived me but predeceased my said wife, leaving issue him or her surviving, and then alive, and shall keep such shares or share invested and shall use so much of the income and capital thereof as they may consider necessary or advisable for the benefit of such issue of such deceased nephew or niece until they respectively attain the age of twenty-one years when each shall be entitled to receive an equal proportion of such shares or share or all to one if only one should attain the age of twenty-one years.

* * *

V. Notwithstanding anything in this my Will contained I expressly authorize my Trustees at any time and from time to time to make advances to my wife out of prospective income or to give to or for her benefit such part of the capital of my estate as my Trustees in their uncontrolled discretion may deem necessary or advisable for her proper support maintenance and comfort and to advance to and for the benefit of any of my nephews or nieces or their issue such part or parts of the capital of the prospective shares of such nephews or nieces or their issue or of the share of my estate for the time being held for the benefit of such nephews or nieces as in their uncontrolled discretion my trustees may deem advisable.

* * *

VII. Should any company or corporation in which I or my estate may hold shares or other interest increase its capital, I authorize my Trustees to subscribe for and take up the proportions of such increased capital to which as holders of shares or other interest in such company or corporation they may be entitled, and to pay for the same out of the moneys of my estate, or in the alternative to sell their rights to such allotment; and I further authorize my Trustees if in their opinion it would be in the interest of my estate so to do, to subscribe for and pay for or purchase additional shares in any such company or corporation. I further authorize my Trustees to join in any plan for the reconstruction, reorganization or amalgamation of any such company or corporation or for the sale of the assets of any such company or corporation or any part thereof, and they may in pursuance of any such plan accept any share or securities in lieu of or in exchange for the shares or other interest held by my estate in such company or corporation. I further authorize my Trustees if in their discretion they consider it in the best interest of my estate so to do, to enter into any pooling or other agreement in connection with my interest in such company or corporation and in case of sale thereof to give any options they may consider advisable. In giving to my Trustees the foregoing powers, it is my intention to give to my Trustees power and authority to deal with my interest in any such company or corporation in which I may be interested at the time of my death to the same extent and as fully as I could do if I were alive.

* * *

IX. If at the time of my death I am liable as endorser, guarantor, surety or otherwise for any liability of any company, person or persons, I authorize and empower my Trustees to renew

from time to time in their discretion the bills, notes, guarantees or other securities or contracts evidencing such liability, and for that purpose to enter into new bills, notes, or other securities or contracts for and on behalf of my estate. My intention in conferring upon my Trustees the powers and discretions by this clause conferred is to give them such powers and authorities as will enable them to assist in the gradual liquidation of the liabilities which I may be under in order that the companies or persons for whom I may be liable as aforesaid may not be unduly embarrassed.

* * *

The effect of the codicils is merely to vary the amount of the share provided for the testator's nephew, William Marr Crawford, and to increase the amount of the annuities given to the testator's sisters. It was not suggested that the codicils or any parts of the will other than those set out above have any bearing on the matter in dispute.

The general rules applicable to the problem before us have often been stated and the question we have to decide is not what these rules are but how they are to be applied to the will now under consideration.

The underlying rule is stated in the following words in *Macdonald* v. *Irvine* (1), by Baggallay L.J. who differed from the other Lords Justices as to whether the rule applied in that case but not as to the nature of the rule. At pages 112 and 113 he said:—

The rule as laid down by Lord Eldon in *Howe* v. *Earl of Dartmouth* (2) and as explained by subsequent decisions, and particularly by Lord Cottenham in *Pickering* v. *Pickering* (3) amounts to this, that where there is a residuary bequest of personal estate to be enjoyed by several persons in succession, a Court of Equity, in the absence of any evidence of a contrary intention, will assume that it was the intention of the testator that his legatees should enjoy the same thing in succession, and, as the only means of giving effect to such intention, will direct the conversion into permanent investments of a recognised character of all such parts of the estate as are of a wasting or reversionary character, and also all such other existing investments as are not of the recognised character and are consequently deemed to be more or less hazardous.

But it must be borne in mind that the rule when acted uopn is based upon an implied or presumed intention of the testator, and not upon any intention actually expressed by him, and Courts of Equity have consequently always declined to apply the rule in cases in which the testator has indicated an intention that the property should be enjoyed in specie, though he may not in a technical sense have specifically bequeathed it.

The real question, therefore, in all cases similar to that under consideration, is, whether the testator has with sufficient distinctness indicated his intention that the property should be enjoyed by his wife in specie.

(1) 8 Ch. D. 101. (2) 7 Ves. 137.
(3) 4 My. & Cr. 289.

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A great number of authorities have been cited in the course of the argument before us for the purpose of illustrating the principles upon which Courts of Equity have from time to time acted in deciding whether expressions or indications of intention, more or less distinct, have or have not been sufficient to exclude the adoption of the rule. These authorities, for the most part, turn upon the special circumstances of the particular cases under consideration, but they nevertheless, upon the whole, shew an inclination on the part of successive Judges to allow small indications of intention to prevent the application of the general rule.

In the case at bar the two matters chiefly relied upon as sufficiently indicating an intention that the widow should enjoy the income in specie are the wide power to retain unauthorized securities contained in paragraph IV (*b*) of the will and the comprehensive words of gift of the income in paragraph IV (*e*).

In speaking of the effect of a power of retention following a direction for conversion of personal estate, Kekewich J. said, *In re Thomas* (1):—

> I am not prepared to hold that where there is a direction for conversion of personal estate, followed by a power of retention of existing securities in the absolute discretion of the trustees, and then there are trusts for tenants for life, and afterwards for remaindermen, the power of retention necessarily gives the tenants for life the enjoyment in specie of the securities retained by the trustees in the exercise of their discretion.

This passage is quoted with approval by Warrington J. in *In re Chaytor* (2), at 238, and appears to me to correctly state the law so far as it goes. The question, however, immediately arises as to what, in such a case, are the indicia to lead the court of construction to the testator's true intention. After a consideration of all the authorities to which reference was made during the argument I think that their effect is accurately summarized in the following passage in Theobald on Wills, 10th Edition at page 380:—

> It is, however, a question of construction in each case whether the power to postpone or retain is merely ancillary to the trust for conversion or is a power to continue or retain permanently. In the latter case the inference is that it is for the benefit of the tenant for life, and if what is given to him is the income of the converted and unconverted property or the income of the securities representing the estate, he will be entitled to the income of securities retained.

In my opinion the words of clause IV (*b*) of the will confer upon the trustees a power to retain permanently, by which I mean until the trusts in the will are all completely executed. It is true that there is an apparent contradiction

(1) [1891] 3 Ch. 482 at 486. (2) [1905] 1 Ch. 233.

between the trust to sell and convert with which the clause opens and the power to retain indefinitely but the direction to convert is qualified by a power to postpone the conversion of the whole estate or any part or parts thereof for such length of time as the trustees may think best and there is added the express declaration:—

> . . . and I hereby declare that my Trustees may retain any portion of my estate in the form in which it may be at my death (notwithstanding that it may not be in the form of an investment in which Trustees are authorized to invest trust funds and whether or not there is a liability attached to any such portion of my estate) for such length of time as my Trustees in their discretion deem advisable, and my Trustees shall not be held responsible for any loss that may happen to my estate by reason of their so doing.

It is difficult to think of words by which the testator could have more clearly authorized the indefinite retention of the shares with which we are concerned. The will must be construed as of the date of the testator's death and I have not been influenced in construing this clause by the fact that the trustees are still retaining the shares and no counsel has suggested that they are not acting wisely and within the terms of the will in so doing.

While the power to retain these shares permanently permits an inference that the power is given for the benefit of the life tenant this is not conclusive and it is next necessary to examine the words in which the gift of income is made to her. It is in those words that the distinction between the will before us and that in *In re Chaytor* (*supra*) is to be found.

The words by which the income is given to the widow for life are in clause IV (*e*). The opening words are:—"To keep the residue of my estate invested and to pay the net annual income thereof until the death of my wife as follows:—" The direction "To keep invested" is complied with *pro tanto* just as fully by the retention of investments which under clause IV (*b*) the trustees are authorized to retain as by the investment of the proceeds of such securities as they decide to convert and the words "The net annual income thereof" describe the net income arising in each year from the residue of the estate kept invested. I can find no reason for reading these words as meaning "the net annual income of the investment of the proceeds of the conversion of the residue of my estate" and in my view on its proper

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construction clause IV (*e*) disposes of the income not only of those parts of the residue which are converted and reinvested but also of those parts retained unconverted by the trustees. The testator in the following words of clause IV (*e*) disposes of all this net annual income. The first $6,000 goes to the widow, annuities are then provided for the testator's sisters and his secretary and the clause concludes with the words:—"Any surplus income over and above what is required to pay the aforesaid annuities shall be paid to my wife". I conclude that the testator has given to his widow by the words of clause IV (*e*) the net annual income of all the securities representing the residue of his estate including the income from unconverted as well as converted property, subject only to the payment of the annuities mentioned above.

In reaching this conclusion I have not overlooked the argument founded on paragraph VII of the will. For the respondents it was said that the use of the words "if in their opinion it would be in the interest of my estate" and "if in their discretion they consider it in the best interest of my estate so to do" in paragraph VII furnish an indication that the powers of postponement and retention given in IV (*b*) were not for the benefit of the life tenant; but it appears to me that the fact that such words while used in paragraph VII were not used in IV (*b*), in so far as it has any bearing on the question, assists the view of the appellants rather than that of the respondents.

The courts below regarded the wording of the relevant portions of the testator's will as indistinguishable from that under consideration in *In re Chaytor* (*supra*); but if it be granted that there is no difference of substance between the words imposing the trust for sale and giving the powers of postponement and retention, there appears to me, as already indicated, to be a very real difference between the words of gift of the income in the two cases. In *In re Chaytor* Warrington J. construed the words of gift as relating only to the income from such investments as represented the proceeds of conversion and could find nowhere in the will either an express or implied gift of the income of items of property forming part of the testator's estate during postponement of conversion. This appears clearly at pages 238 and 239 of the report.

While, as in all questions of construction, the matter must be determined on the words of the will before us and a comparison with the more or less similar words used in wills construed in other cases is of only limited assistance, it appears to me that the present case falls within the decision in *In re Thomas* (*supra*) rather than that in *In re Chaytor* (*supra*). *In re Thomas* was approved and followed by Warrington J. in *In re Godfree* (1).

I can find no substantial difference between the relevant words in the will in the case at bar and those in the will considered in *In re Aste* (2), in which Eve J. says at page 660:—

> I do not think on a fair reading of the whole will the testator can be said to have restricted the expression "my said residuary estate" to the proceeds of conversion and the investments for the time being representing the same. Had he done so, the tenant for life, according to the authorities, and notwithstanding the powers to postpone conversion and retain investments, would not have been entitled to the full income of unconverted residue. But the testator does, I think, intend to include in "my said residuary estate" and "my residuary estate" the whole residue in whatever form of investment it may be from time to time, and does not limit the income of which he is disposing to the income of proceeds of conversion. It is to be observed that he does not, as many testators do after the trust for investment of the proceeds of conversion add "hereinafter referred to as my said residuary estate" in which case the gift of the income would necessarily be correspondingly restricted, and when he comes to the gift of income he does not say "of the said investments" or "of the trust premises", but uses an expression wide enough to include the income of the whole estate, however invested, and rather cumbersome if he really intended to confine it to the estate when converted.

For the above reasons, I would allow the appeal and would vary the judgment of Macfarlane J. by striking out paragraphs numbered 3, 4, 5, and 6 thereof and substituting therefor the following paragraph:—

> 3. That subject to the terms of the will and codicils in relation to the payment of annuities referred to therein the defendant Catherine McLean Crawford is entitled to the whole of the said sums of $177,855.49 and $148,494.04.

The said sums may of course be resorted to by the trustees for the payment of any costs or trustees' compensation which may be properly chargeable against them.

There remains the question of costs. In both courts below it was ordered that the costs of all parties as between solicitor and client be paid out of the estate of the deceased.

(1) [1914] 2 Ch. 110.

(2) (1918) 87 L.J. Ch. 660.

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We were informed by counsel that such an order is not unusual under the practice in British Columbia particularly where counsel have been appointed to represent parties to whom it would be difficult to resort for payment of the difference between costs as between party and party and as between solicitor and client. The case appears to be one to which the following words used by Lord Blanesburgh in *Patton* v. *Toronto General Trusts Corporation* (1) at page 639 are applicable:—

> As to the costs in the Court of first instance, it appears to their Lordships that this was pre-eminently a case in which the difficulty being caused by the testator himself, and the question being raised by the executors in the most inexpensive form, an order for the costs of all parties to be paid out of the estate, and even as between solicitor and client, was, in any event, almost a matter of course.

In the somewhat unusual circumstances of this case, I think that the orders as to costs in the courts below should stand and that the costs of all parties in this Court should also be paid out of the estate those of the executors as between solicitor and client.

Before parting with the matter I wish to call attention to the following point. I do this with diffidence as it was not raised before us, does not appear to affect the question with which we have to deal and may well have been considered by the parties concerned. It will be observed that the residuary estate is settled (subject to the annuities to the sisters and secretary of the testator) (*a*) upon the widow for life; (*b*) upon her death upon the nephews and nieces of the testator *then surviving* in equal shares for their lives; (*c*) upon the death of each nephew or niece, as he or she may appoint under a special power to appoint by will which includes a power to appoint to a surviving widow or widower for life. As the nephews or nieces who will take for their lives on the death of the widow are not limited to nephews and nieces alive at the death of the testator and, in contemplation of law, further nephews and nieces might be born after the death of the testator and before the death of the widow, and as nephews or nieces of the testator, themselves born after his death, might marry persons born after the testator's death and appoint to such persons for

(1) [1930] A.C. 629.

life, I venture to suggest that the parties should give consideration to the effect of the rule against perpetuities upon the validity of the trusts which are directed to take effect following the death of the testator's widow.

Appeal dismissed with costs.

Solicitor for the Plaintiffs (Appellants): *R. A. C. Douglas.*

Solicitor for the Defendant (Appellant): *W. S. Lane.*

Solicitor for the representative defendant Class 3: *J. K. Macrae.*

Solicitor for the representative defendant Class 4: *G. E. Housser.*